United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2004
~~74-8131~~

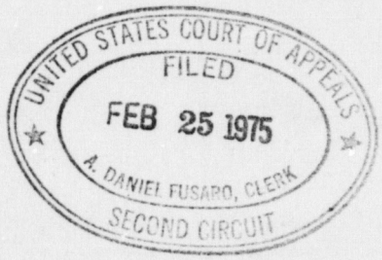
To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. EDWARD F. LaBELLE, Petitioner-Appellant, -against- THE HONORABLE J.E. LaVALLEE, Superintendent, Clinton Correctional Facility, Respondent-Appellee.	Docket No. 74-8131

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
DENYING A WRIT OF HABEAS CORPUS



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QUESTION PRESENTED

Whether the admission into evidence at LaBelle's trial of items seized from his car and apartment was unconstitutional.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Northern District of New York (The Honorable Edmund Port) rendered on November 16, 1973, denying relator-appellant LaBelle's petition for writ of habeas corpus. On January 7, 1975, this Court granted a certificate of probable cause and leave to appeal in forma pauperis, and assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

A. LaBelle's Prior Appeal

LaBelle was originally convicted of murder in the Rensalaer County Court in 1964 and sentenced to death. However, in December 1968, this Court reversed the conviction, holding that LaBelle was entitled to a new trial because of a Bruton violation (Bruton v. United States, 391 U.S. 123 (1968)) at the original trial. United States ex rel. LaBelle v. Mancusi, 404 F.2d 690 (2d Cir. 1968).

B. Proceedings Relevant to the Present Appeal

At retrial LaBelle was again convicted of murder and sentenced, on July 2, 1970, to a term of life imprisonment. The Appellate Division affirmed the conviction, 37 A.D.2d 135 (3d Dept. 1971),* and the New York Court of Appeals denied leave to appeal to that court on July 28, 1972. LaBelle is currently serving his sentence at the Clinton Correctional Facility, Dannemora, New York.

Prior to his retrial, LaBelle moved to suppress certain evidentiary items seized from his car, his apartment, and his person, on the ground that the seizures violated his Fourth and Fourteenth Amendment rights. (A copy of this motion is set forth at pages 52-54 of the State appeals record, included as part of the record in this appeal). Following a pretrial hearing (State appeals record at 62-229), the State trial court denied the motion. (A copy of the opinion is set forth at "D" of appellant's separate appendix). Following his conviction, LaBelle raised this same issue in his direct appeal. (A copy of the brief filed by LaBelle before the Appellate Division, Third Department, is included in the record on appeal).

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*A copy of this opinion is set forth at "C" of appellant's separate appendix.

C. The Evidence

On November 30, 1963, the police discovered the body of a murder victim, Rosemary Snay. Lieutenant-Supervisor Brandon of the New York Police Bureau of Criminal Investigation was placed in charge of investigating the homicide (143*). Prior to LaBelle's arrest on December 3, 1963, the only information Brandon's investigators had learned which would make Edward LaBelle a suspect in the Snay homicide was that LaBelle and his brother had been in Cohoes, the town near where Snay's body was found, on the day of the homicide (175).

On December 2, 1963, a girl named Mary Dolan was referred to Brandon and complained to him that she had been assaulted by two men on the same day and in the same area where the Snay murder had occurred. She described the two men and the car they had driven and signed a statement (set forth in the Exhibit Volume of the State appeals record at 33). No oath was administered to Dolan before she made the statement, and the statement was not verified. (Id.; see also the hearing transcript at 190-191). On the basis of Dolan's information, Brandon telephoned Detective Leo Barry and asked him to apply to a magistrate for two "John Doe" warrants charging a third-degree assault (a misdemeanor). Barry prepared an information based on "information

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*Numerals in parentheses refer to pages of the transcripts of the hearing and trial, Volumes I and II of the State appeals record, included in the record on appeal to this Court.

and belief" relying solely on the information Brandon had communicated to him (201, 207, 218, 222). Neither Dolan's statement nor any other supporting deposition was attached to the information. On the basis of this application, the magistrate issued two "John Doe" warrants for misdemeanor assault (set forth in the State appeals record, Exhibit Volume, at 36).

At LaBelle's trial, the court instructed the jury that these warrants and LaBelle's arrest were illegal (943, 958). The prosecutor took no exception to this charge. The Appellate Division likewise held that the warrants were invalid. 322 N.Y.S. 2d at 748.

After Barry obtained the warrants, Brandon gave one of them to police investigators Keating and Garrett, both of whom were at that time working on the Snay homicide (74, 128), and instructed them to use the warrant to arrest Edward LaBelle (76). Keating testified that when Brandon gave them the warrants he told Keating that he wanted to search LaBelle's car for evidence of a possible tie-in with the Snay homicide (97). Both investigators knew that LaBelle was a suspect in the Snay murder, but that there was not yet sufficient evidence to link him to that crime (85). Neither of them interviewed Dolan or had any personal knowledge of the misdemeanor assault other than some unspecified information that had been given them by "other people" (85, 128).

On December 3, 1963, Keating and Garrett arrested LaBelle. They testified at the suppression hearing that they first spotted him as he was getting into his car (65, 77) and followed his

car in their own vehicle waiting for an opportunity to arrest him (65-67). According to their testimony, there was a great deal of ice and show on the road, and LaBelle's car, having bald tires, skidded and came to a halt on a hill (66). After the car stopped, Garrett told LaBelle to get out of the car and arrested and handcuffed him, telling him that he was being arrested on a misdemeanor assault warrant (67).

Keating and Garrett then notified police headquarters as to the arrest of LaBelle and the location of his car, and waited with LaBelle at the car until Officer White, dispatched by headquarters, arrived to take charge of the car (70). LaBelle was then taken to the nearest police station where the police, in the course of a search of his person, discovered and seized his driver's license and automobile registration (70-71).

White entered the car to check its brake and to see whether the ignition key was there (102). While thus inside the car, he noticed a stain on the dashboard which he suspected was blood (102). The car was then towed to a police garage, where it was searched. The search revealed other stains on the interior of the car which, upon testing, were identified as the same type of blood as that of the homicide victim (790-791). The search also disclosed several hairs of the same type as the victim's, a zipper talon which fit the zipper on the victim's pants, and part of a brassiere strap which fit a missing part of the victim's brassiere. A search of the car's trunk disclosed a crow-

bar and hatchet, both of which contained blood and hairs of the same type as the victim's (789, 793-794). The police, citing the evidence seized in the car (182), then obtained a search warrant to search LaBelle's home, where they seized clothing owned by LaBelle which contained human bloodstains and soil of the same metallic composition as the soil where Snay's body was found (121-123, 577, 785, 787).

The trial court denied LaBelle's motion to suppress, holding that there was ample testimony justifying his arrest and the seizure of the car, and that the removal of the car to the police garage to be searched was justified by the fact that it would have been difficult to search the car on the road where the arrest occurred (230). (A copy of the trial court's opinion is set forth at "D" of appellant's separate appendix).

On appeal, the State conceded, and the Appellate Division held, that at the time of the arrest the police did not have probable cause to arrest LaBelle for murder or probable cause to search his car. 332 N.Y.S.2d at 749-750. Likewise, the Appellate Division held that the misdemeanor assault warrant on which LaBelle was arrested was invalid. Id., at 748. The court held, however, that the arrest for assault was valid because the arresting officers had information constituting probable cause to make that arrest:

> The details of the assault were communicated to Keating and Barrett by Lieutenant Brandon who had talked to Mary Dolan.
>
> Id., at 748.

The Appellate Division further held that once Officer White had observed what he believed to be a bloodstain on the dashboard, the police had probable cause to search the car in connection with the Snay murder. Id., at 748-750. The court also held that the car was taken to the police garage for purposes of such a search. Id., at 748. (A copy of the opinion of the Appellate Division is set forth as "C" of appellant's separate appendix).

The New York Court of Appeals denied LaBelle permission to appeal.

In denying LaBelle's petition for writ of habeas corpus, the District Court adopted the Appellate Division's decision. (A copy of the District Court opinion is set forth as "B" of appellant's separate appendix).

ARGUMENT

THE ADMISSION INTO EVIDENCE AT LABELLE'S TRIAL OF ITEMS SEIZED FROM HIS CAR AND HIS APARTMENT WAS UNCONSTITUTIONAL.

At the time of LaBelle's arrest for misdemeanor assault, the police seized his car, and later, after taking it to the police garage, searched its interior, uncovering numerous items of incriminating evidence which were later introduced against LaBelle at trial. The State also introduced items seized from LaBelle's apartment during a search made pursuant to a warrant. Since all of these seizures were unconstitutional, the evidence was inadmissible.

A. Since LaBelle's arrest was illegal, the seizure of his car and the search of his person were in violation of his Fourth Amendment rights.

The constitutionality of the initial seizure of LaBelle's car, like any other seizure, is governed by Fourth Amendment requirements. See, e.g., United States v. Molkenbur, 430 F.2d 563, 566 (8th Cir. 1970); Pendleton v. Nelson, 404 F.2d 1074, 1077 (9th Cir. 1968).* Since the police had obtained no warrant

*Molkenbur and Pendleton are illustrative of the cases holding that a seizure, even when not preceded by a search, is still subject to Fourth Amendment requirements.

authorizing this seizure, it was unconstitutional unless it was shown to fall into the exception to that Amendment's warrant requirement which permits warrantless searches and seizures of contraband or evidence of guilt if incident to a lawful arrest. See, e.g, Ker v. California, 374 U.S. 23, 34-35 (1963). Here, since the arrest was unlawful, the seizure was unconstitutional. Id.

A search or seizure which the State seeks to justify as incident to an arrest is constitutionally valid only if the arrest itself was lawful. See, e.g., Ker v. California, supra, 374 U.S. at 34-35; United States v. Rabinowitz, 339 U.S. 56, 61 (1960); Marron v. United States, 274 U.S. 192, 188-189 (1927). Moreover, in order to qualify as a "lawful" arrest for this purpose, the arrest must satisfy not only constitutional requirements, but also State law requirements as well. Thus, the Supreme Court, in Ker v. California, supra, in determining whether a warrantless search was constitutionally justified as incident to a "lawful" arrest, stated:

> This Court, in cases under the Fourth Amendment, has long recognized that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. Miller v. United States [357 U.S. 301 (1957)]; United States v. DiRe, 332 U.S. 581 ... (1948); Johnson v. United States, 333 U.S. 10, 15, n.5 ... (1948). A fortiori, the lawfulness of these arrests by state officers for state offenses is to be determined by California law.

Id., at

Although the Court, in Ker, had already determined that the arrest in that case was itself constitutional, it went on to determine whether the arrest had also been lawful under state law. If it had not been, then the arrest could not have been used to justify a warrantless search as incident to that arrest. See also Johnson v. United States, supra. In the present case, LaBelle was arrested on a "John Doe" warrant for a misdemeanor assault. The State conceded, and the Appellate Division held, that at the time of this arrest the police lacked probable cause to arrest LaBelle for murder. 322 N.Y.S. 2d at 749-750. Furthermore, every court to consider this case to date has held that the "John Doe" arrest warrant for misdemeanor assault on which the officers based their arrest of LaBelle was invalid. The information on which the warrant was based was executed by County Detective Leo Barry at the request of Lieutenant-Supervisor Brandon. It was made "on information and belief," but no supporting deposition was attached to the information, and in fact Barry's knowledge of the alleged assault was not based on his personal knowledge, but rather on information he received during a telephone conversation with Brandon. Brandon's information, in turn, was based solely on Mary Dolan's statement. Dolan's statement, however, was not attached to the information, and even if it had been it would not have provided valid support for the information because it was unsworn and unverified. Consequently, the information was invalid (People v. Bertram, 302

N.Y. 526 (1951)), as was the ensuing warrant. People v. Briggs, 25 A.D.2d 50, 51 (3d Dept. 1966).

On the basis of this evidence, the trial judge charged the jury that the arrest warrant and LaBelle's arrest were illegal. The prosecutor took no exception to this charge, thereby rendering it the law of the case. Moreover, the Appellate Division also held that the warrant was invalid. 322 N.Y.S. 2d at 748.

However, the Appellate Division held that the misdemeanor arrest was valid despite the invalidity of the arrest warrant because it was "made upon probable cause held by the arresting officers." 332 N.Y.S.2d at 748. This holding was clearly erroneous.

First, even assuming arguendo that the police possessed knowledge constituting probable cause, the arrest was unlawful under New York State law, which provides that a warrantless arrest for a misdemeanor is valid only when the offense occurred in the presence of the arresting officer. See Code of Criminal Procedure, §177 (McKinney Supp. 1967); People v. Dority, 282 A.D.2d 993 (1953). In this case, both of the arresting agents testified that they had no personal knowledge of the misdemeanor assault, had not even spoken to Dolan, and had executed the arrest warrant solely because they had been instructed to do so. In Johnson v. United States, supra, the Supreme Court held that just such a violation of state law would render a search or seizure incident to that arrest unconstitutional. See also United States v. DiRe, supra, 332 U.S. at 591; Banks v. Peper-

sack, 244 F.Supp. 675 (D.Md. 1965).

Alternatively, the arrest was violative of the Fourth Amendment for the same reason. An arrest is a seizure, governed by Fourth Amendment requirements. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968). As with New York State law, common law, incorporated into the Fourth Amendment, has long required that

> a police officer ... may only arrest without a warrant one guilty of a misdemeanor if committed in his presence. Kurtz v. Moffitt, 115 U.S. 487 ...; John Bad Elk v. United States, 177 U.S. 529 .... The rule is sometimes expressed as follows:
>
> "In cases of misdemeanor, a peace officer like a private citizen has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." Halsbury's Laws of England, vol. 9, part. III, 612.
>
> Carroll v. United States, 267 U.S. 132, 157 (1925).

Put somewhat differently, a warrantless arrest for a misdemanor which occurred outside the presence of the arresting officer is without authority under State, Federal, or common law, and fails therefore to comply with the reasonableness requirement of the Fourth Amendment. Cf. Banks v. Pepersack, supra. LaBelle's arrest, lacking such authority, was unconstitutional.

Alternatively, even if the police had otherwise complied with with State and Constitutional law, the misdemeanor arrest in this case was invalid simply because the police did not have

probable cause to believe that LaBelle was the individual who committed the assault. At the time of LaBelle's arrest, Dolan had not identified LaBelle as one of the persons who assaulted her. Rather, she had provided only general descriptions of her assailants and a description of the car in which they were riding. Thus, despite the fact that the police already knew of LaBelle, the warrants were obtained in the name of "John Doe," clearly indicating that the police lacked probable cause to name him as one of the assailants. The State introduced no evidence to show that the police had identified the car which Dolan described as LaBelle's car prior to LaBelle's arrest. Even assuming arguendo that they had, the mere fact that Dolan's assailants were riding in LaBelle's car would not establish probable cause to believe that LaBelle was, in fact, one of those assailants. The State likewise introduced no evidence that anyone familiar with LaBelle's appearance had identified him as fitting the description Dolan had given of her assailants. Similarly, there was no evidence that the arresting officers had been furnished with Dolan's description of her assailants, or had established that LaBelle met one of those descriptions prior to his arrest. Rather, the officers testified that they had not interviewed Dolan and had no personal knowledge of the misdemeanor assault. They were merely handed the "John Doe" warrant and told to use it to arrest LaBelle.

Thus, on any one of these three grounds, LaBelle's arrest was illegal. Consequently, the warrantless seizure of LaBelle's

car incident to his arrest was unconstitutional. Ker v. California, supra; Johnson v. United States, supra; United States v. Chodak, 68 F.Supp. 455 (D.Md. 1946). Since it was the initial seizure of the car which lead to the discovery of the bloodstain on the car's seat, on which the State then relied to justify the subsequent search of the interior of the car and its trunk, the bloodstain and the items uncovered during the search were the tainted products of the initial, unconstitutional seizure. Wong Sun v. United States, 371 U.S. 471 (1963). Similarly, since the subsequent warrant authorizing the search of LaBelle's apartment was based on the items uncovered in LaBelle's car, the items seized in the apartment were also tainted products of the initial unconstitutional seizure, and were therefore inadmissible as evidence. Wong Sun v. United States, supra.

B. Even if LaBelle's arrest for misdemeanor assault was valid, the subsequent removal of his car to the police garage and its search there were unconstitutional.

Assuming arguendo the validity of LaBelle's arrest for purposes of this argument (but see Point A, supra), the subsequent removal of the car to the police garage and its warrantless search there for evidence relating to the Snay homicide were unconstitutional. First, the removal of the car to the garage and its search could not be justified as incident to

LaBelle's arrest. Searches incident to arrest are constitutionally permissible as an exception to the search warrant requirement only for the limited purpose of discovering weapons within the arrestee's reach or evidence or contraband which he might hide or destroy. Chimel v. California, 395 U.S. 752 (1969). Consequently, once an arrestee is removed from the vicinity of his car, a search of that car can no longer be justified on that basis. Chimel v. California, supra; Preston v. United States, 376 U.S. 364, 367(1964). In the present case, Officer White's initial entry into LaBelle's car, and the subsequent removal of the car to the police garage and its search there, all occurred after LaBelle had been removed from the vicinity of the car and transported to the police precinct. Consequently, the removal and search of the car were not incident to LaBelle's arrest or constitutionally permissible on that basis.

Similarly, assuming arguendo that the police had probable cause to arrest LaBelle for misdemeanor assault, the State can not claim that that probable cause justified the removal and search of the car. Rather, a search of the car in relation to the misdemeanor assault charge was invalid unless the police had probable cause to believe that the car contained contraband, weapons, or other evidence relating to that charge. Chambers v. Maroney, 399 U.S. 42, 47, n.6 (1970); Barrentine v. United States, 434 F.2d 636 (9th Cir. 1970). Here, neither Dolan's statement nor any other information possessed by the police at

the time of the search supported such a conclusion. In fact, there were no contraband, weapons, or other evidence relating to the misdemeanor assault charge. Moreover, the arresting officers testified that they had no reason to believe that the car contained any such items at the time they arrested LaBelle.(94-5)

Nor can the removal of the car to the police garage and its search be justified as a "routine inventory" for the protection of the defendant's property or a community care-taking operation. Cady v. Dombrowski, 413 U.S. 433(1973). Keating, one of the arresting officers, testified that prior to LaBelle's arrest, when Brandon gave Keating the "John Doe" warrant and instructed him to arrest LaBelle, Brandon told Keating that he wanted to search LaBelle's car for evidence of a possible tie-in with the Snay homicide (97). As this Court recently held in rejecting a claim that a search was for routine inventory purposes in United States v. Capra, 501 F.2d 267, 280 (2d Cir. 1974):

> [t]he government contended at the hearing that this was a routine inventory search for the protection of the defendant's property, but the trial court properly rejected that argument because, even though the police may have "exercised a form of custody or control" over the car, they clearly conducted the search for the purpose of securing incriminating evidence. Cady v. Dombrowski, 413 U.S. 433, 443 ... (1973).

In light of Keating's testimony, the same reasoning controls in this case.*

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*Moreover, the nature of the search, which included vacuuming the interior of the car, chemical analysis of the stains found in the car, and the removal of the car's door handles, is scarcely the type of search which would be undertaken for "routine inventory" purposes.

Moreover, in Cady v. Dombrowski, supra, the Court found that the action of the police in taking custody of an arrestee's disabled vehicle was constitutionally justifiable only because the arrestee:

> being intoxicated (and later comatose), could not make arrangements to have the vehicle towed and stored.
>
> (Id. at 443)

Implicit in that holding was the Court's recognition that where an arrestee is not intoxicated or comatose, he is capable of making his own arrangements from the precinct to have his disabled vehicle privately towed and stored. In the present case, LaBelle was perfectly capable of making such arrangements. Consequently, the police had no justification for taking custody of his car.

Furthermore, since Keating was told at the time he was directed to arrest LaBelle for misdemeanor assault that the police wished to search LaBelle's car for evidence of a tie-in with the Snay homicide, it appears that the misdemeanor arrest, whether or not legal in itself, was in reality a sham arrest for the purpose of enabling the police to search LaBelle's car for evidence relating to the homicide. As such, the evidence seized as a result of that search was constitutionally inadmissible. As this Court held in United State v. Edmons, 432 F.2d 577, 582 (2d Cir. 1970):

> Whether or not the arrests were illegal. . . they afforded no lawful basis for procuring evidence with respect to the entirely different offenses for which appellants have been convicted. Cf. Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968).

Finally, the State cannot justify the removal of the car to the police garage and its search there as being based on probable cause to believe that it contained evidence relevant to the Snay homicide. The State conceded, and the Appellate Division held, that the police did not have such probable cause at the time the car was initially seized. 322 N.Y.S.2d at 749-750. The Supreme Court in Chambers v. Maroney, supra, 399 U.S. at 52, held that the warrantless removal of a car to a different location so that it may be searched is constitutionally justifiable only if the police possess probable cause for such a search at the time the removal procedures are initiated. See also United States v. Carneglia, 468 F.2d 1084, 1089-90 (2d Cir. 1972), cert. denied sub. nom. Inzerillo v. United States, 410 U.S. 945 (1973). In the present case, to the contrary, the earliest point at which the State claims that the police had probable cause to search the car was when White, having entered the car to secure it for removal to the police garage, observed what he suspected to be a bloodstain. However, the State's reliance on White's observation to establish probable cause is invalid. When White entered the car, it had already been seized by the police for the purpose of search. White's entry into the vehicle for the purpose of removing it to the police garage was, in fact, the first stage of the search itself. Consequently, the stain he discovered cannot be relied

upon to establish probable cause for that search. United States v. DiRe, supra, 332 U.S. at 595; Byars v. United States, 273 U.S. 28, 29 (1927).

Moreover, even assuming arguendo that White's "seizure" of the stain on the interior of the car was somehow constitutional, that stain did not give the police probable cause to search the car at the garage for evidence of a tie-in with the Snay homicide. White testified at the hearing that he had no expert qulifications and that he was not even certain that the stain he observed as a blood stain (106). The police had no reason to believe that the stain was blood of the same type as Snay's, or that the stain had originated as the result of some criminal activity, or that the car contained evidence of criminal activity. Moreover, the Appellate Division, in holding that the search of the car at the police station was reasonable, stated that "officer Pollack observed blood stains on the car other than those White saw, after the car was delivered to him but before he entered it," 322 N.Y.S. 2d at 750, implying that these stains were seized before the search began and contributed to the requisite probable cause for that search. Pollack's own testimony, however, was directly to the contrary. He stated that he first observed the other stains while he was photographing the interior of the car, well after the search had commenced (115). Consequently,

Pollack's "seizure" of those stains was a fruit of the search, and could not be relied upon to establish probable cause. United States v. DiRe, supra, 332 U.S. at 595; Byars v. United States, 273 U.S. 28, 29 (1927).

Since the search of the car was justifiable neither as incident to arrest nor as pursuant to probable cause, the items seized as a result of that search were inadmissible at LaBelle's trial. Similarly, since the probable cause to search LaBelle's apartment was based on the items seized from his car, that evidence, too, was inadmissible. Wong Sun v. United States, supra.

CONCLUSION

For the foregoing reasons, the writ of habeas corpus must be granted and petitioner-appellant LaBelle released from custody.

Respectfully submitted,

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February 25, 1975

Certificate of Service

February 25, ____, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

[signature]